Supreme Court, U.S.
FILED
SEP 21 1995
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No. 95-141

In The

Supreme Court of the United States

October Term, 1995

KEITH J. KANOUSE, SR.,

Petitioner,

vs.

GUNSTER, YOAKLEY & STEWART, P.A., A FLORIDA PROFESSIONAL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Section 525(b) of the Bankruptcy Code, by its plain meaning affords protection against employment discrimination only to an individual "who is or has been a debtor" and does not afford protection to an individual, such as Kanouse, who is not a debtor nor ever has been a debtor, at the time of the occurrence of the alleged acts of employment discrimination.

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STATEMENT OF THE FACTS

Consistent with its practice below, Gunster has consciously sought in every instance to avoid needless factual disputes in an effort to streamline the resolution of the legal issues presented in this appeal. For the limited purposes of this proceeding, Gunster, therefore, does not dispute Kanouse's statements with respect to the factual events occurring prior to the termination of his employment, that it would otherwise controvert. However, Gunster does not concede the accuracy of the legal conclusions that Kanouse derives from his factual narrative.

The Eleventh Circuit's Opinion presents a straightforward ruling on a matter of statutory construction. The facts relevant to that legal determination are few and may be succinctly stated as follows.

1. From September 15, 1983 through November 1, 1990, Kanouse was a shareholder, officer, director and employee of Gunster.

2. Kanouse asserts that in 1990, Gunster threatened him with relation to his insolvency and contemplation of commencing a bankruptcy case, including alleged threats by various firm members to cause him to be immediately expelled from Gunster if he filed for bankruptcy.

3. By a two-page letter, dated November 2, 1990, Kanouse notified Gunster of his decision to resign effective immediately in order to practice with his own firm, Keith Kanouse, P.A., with newly opened offices in Boca Raton staffed by two Gunster employees, who were leaving with him. Kanouse alleges that this departure was actually a constructive termination by Gunster.

4. On May 31, 1991 (209 days after his November 2, 1990

resignation), Kanouse filed a petition for reorganization under Chapter 11.

SUMMARY OF ARGUMENT

Section 525(b) provides a remedy to *"an individual who is or has been a debtor* under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt . . ." 11 U.S.C. § 525(b) (emphasis added). Section 525(b) bars employment termination or discrimination by a private employer against a debtor or former debtor solely because such debtor: (1) is or has been a debtor under the Bankruptcy Code; (2) has been insolvent before the commencement of a case under the Bankruptcy Code; or (3) has failed to pay a dischargeable or discharged debt. The term "debtor" when used in the Bankruptcy Code is specifically defined in Section 101(13) to mean a "person or municipality concerning which a case under this title *has been commenced."* 11 U.S.C. § 101 (13) (emphasis added).

The question for determination on appeal is whether Kanouse may seek relief under Section 525(b) for alleged acts of employment discrimination which occurred seven months before Kanouse became a "debtor" within the contemplation of the Bankruptcy Code. Given the unambiguous language of Section 525(b) and the Supreme Court's mandate to derive meaning wherever possible solely from the language of the Bankruptcy Code, the answer is plain: Section 525(b) affords no remedy to Kanouse because Kanouse was neither a debtor nor a former debtor at the time of the occurrence of the alleged acts of employment discrimination by Gunster.

REASONS FOR DENYING THE WRIT

I.

SECTION 525(b) OF THE BANKRUPTCY CODE AFFORDS NO REMEDY TO KANOUSE BECAUSE KANOUSE WAS NOT A DEBTOR AT THE TIME OF THE OCCURRENCE OF THE ALLEGED ACTS OF DISCRIMINATION.

A. Section 525(b) Of The Bankruptcy Code

Section 525(b) of the Bankruptcy Code states in pertinent part as follows:

> No private employer may terminate the employment of, or discriminate with respect to employment against, *an individual who is or has been a debtor* under this title . . . *solely because such debtor or bankrupt* —
>
> (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
>
> (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
>
> (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act. (emphasis added).

Thus, Section 525(b) prohibits an employer from discriminating against or terminating the employment of a debtor or former debtor solely because such debtor: (1) is or has been a debtor under the Bankruptcy Code; (2) has been insolvent; or (3) has not paid a dischargeable debt.

B. Kanouse Did Not Become A "Debtor" Under The Bankruptcy Code Until May 31, 1991 When He Filed His Bankruptcy Petition.

For the purpose of the Bankruptcy Code, the term "debtor" is defined in Section 101(13) to mean a "person or municipality concerning which a case under this title *has been commenced*." 11 U.S.C. § 101(13) (emphasis added). To commence a case under the Bankruptcy Code, a person must file a "petition." A petition is defined in Section 101(42) of the Bankruptcy Code as serving the purpose of "*commencing* a case under this title." 11 U.S.C. § 101(42) (emphasis added). Thus, a person such as Kanouse is not invested with the status of a "debtor" under the Bankruptcy Code until a bankruptcy case is commenced through the filing of a petition. Accordingly, Kanouse was not a "debtor" within the contemplation of the Bankruptcy Code on November 2, 1990, the day he resigned from Gunster, and did not become a debtor until some seven months later on May 31, 1991 when he filed a petition for Chapter 11 relief.

C. The Plain Meaning Of Section 525(b) Prohibits Employment Discrimination Only Against An Individual Who Is Or Has Been A Debtor.

By this action, Kanouse seeks to impose liability upon Gunster under Section 525(b) of the Bankruptcy Code for acts of alleged bankruptcy discrimination that ended 209 days before Kanouse became a "debtor" under the terms of the Code. Kanouse's legal theory has no basis in the Code. Section 525(b),

by its plain language, affords no remedy to an individual in Kanouse's circumstance, who was neither a debtor nor former debtor at the time of the occurrence of the alleged acts of wrongdoing.

As explained in the scholarly memorandum opinion of Bankruptcy Judge Mark, which was approved, affirmed, and adopted by the District Court and affirmed by the Eleventh Circuit, this Court requires the Bankruptcy Code to be construed, wherever possible, in accordance with its plain meaning. (App. A, B and C, as attached to Kanouse's Petition for Writ of Certiorari).[1] In the leading case of *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989), the Court enunciated the rule that the Bankruptcy Code must be interpreted in accordance with the meaning of its plain language, except in the rare cases in which the literal application of the statute would present a result demonstrably at odds with the intentions of its drafters. The Supreme Court's rationale for requiring strict construction of the Bankruptcy Code was the recognition that the Bankruptcy Code introduced a sweeping overhaul to a substantial part of the system. Thus, the Court held, "(I)t is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as a statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." 489 U.S. at 240, 109 S. Ct. at 1030.

In the aftermath of *Ron Pair*, the courts, including this Court, have repeatedly given effect to a plain language interpretation of the Bankruptcy Code. *E.g., Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 2248, 119 L. Ed. 2d 519 (1992) (Section

1. For ease of use, throughout this brief, Respondent Gunster will utilize and refer to the Appendix attached to Kanouse's Petition, as appropriate, as App. A, B and C.

541(c)(2)) (when there is clarity of the statutory text, the party urging an interpretation contrary to the plain meaning of the statute bears an exceptionally heavy burden of persuasion); *Union Bank v. Wolas*, 502 U.S. 151, 112 S. Ct. 527, 116 L. Ed. 2d 514 (1991) (Section 547(c)(2)) (the fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning); *Toibb v. Radloff*, 501 U.S. 157, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991) (Section 109); *In re Burns*, 887 F.2d 1541 (11th Cir. 1989) (Section 523(a)(7)); *In re Ferguson*, 134 B.R. 689 (Bankr. S.D. Fla. 1991) (Section 1322(a)(2)); *In re Suarez*, 127 B.R. 73 (Bankr. S.D. Fla. 1991) (Section 522(b)).

In *Burns*, the Eleventh Circuit construed Section 523(a)(7) of the Bankruptcy Code in accordance with its plain meaning. Citing *Ron Pair*, the Court stated that the Bankruptcy Code's origins counsel in favor of emphasizing a plain meaning interpretation of its provisions, and declined to vary the plain statutory language by resorting to conflicting legislative history. *Id.* at 1545. The court in *Burns* resolved "the question of how to read the legislative history in a simple fashion: by reading the statute and taking it at face value." *Id.* at 1551. *Burns* requires a court to first look to the statutory language of the section of the Bankruptcy Code being construed and, if that language is plain, the court must enforce it according to its terms without looking beyond the statute to its legislative history. *Id.* at 1544. This is exactly the analytical approach to the Bankruptcy Code recently utilized and approved by this Court in the case of *Toibb v. Radloff*, 501 U.S. at 162, 111 S. Ct. at 2200.

Moreover, resort to legislative history where, as in the instant case, the language of the statute is unambiguous, is contrary to the canons of statutory construction. *See, e.g., Toibb v. Radloff*, 501 U.S. at 162, 111 S. Ct. at 2200; *In re Burns*, 887 F.2d at 1544. As this Court held in *West Virginia University Hospitals*,

Inc. v. Casey, 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991), unambiguous statutory language cannot be varied by resort to conflicting legislative history:

> The best evidence of congressional purpose is the statutory text adopted by both houses of Congress and submitted to the President. Where the statute contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. Where as here the statute's language is plain, the sole function of the court is to enforce it according to its terms.

499 U.S. at 84, 111 S. Ct. at 1139.

Similarly, "in construing 525(b), most courts have applied the plain meaning of the statute." *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, 21 (1st Cir. 1989) (*citing* collected cases); *See also, In re Exquisito Services, Inc.*, 823 F.2d 151, 153 (5th Cir. 1987) (when analyzing § 525 the focus should be on the section's specific language). In *In re Madison Madison Intern. of Illinois, P.C.*, 77 B.R. 678, 680 (Bankr. E.D. Wis. 1987), for example, the court held that "[b]ecause § 525(b) is unambiguous, no resort to its legislative history is necessary." (*citing* collected cases).

In the instant case, both Judge Mark and Judge Aronovitz found, and the Eleventh Circuit agreed, that the language of Section 525(b) is plain and unambiguous on its face and concluded that the statutory safeguards against employment discrimination extend only to an "individual who is or has been a

debtor." (App. A, B and C). Accordingly, the lower courts found that since Kanouse was not a debtor nor had been a debtor at the time of the alleged acts of discrimination, he is not entitled to relief under 525(b). (App. A, B and C).

D. The Legal Analysis Of Section 525(b) In The Tinker Case Is Unpersuasive.

In order to escape a plain language interpretation of Section 525(b), Kanouse relies primarily upon the holding and the analysis set forth in the case of *In re Tinker*, 99 B.R. 957 (Bankr. W.D. Mo. 1989). Each of the courts below found the legal analysis in *Tinker* to be unpersuasive. (App. A, B and C).

1. *The Facts Of In Re Tinker*

In *Tinker*, a bank terminated an employee, who was also a borrower of the bank. The bank fired the employee when it discovered that the employee secretly had sold certain secured collateral and turned the proceeds over to her bankruptcy counsel. Five days after her discharge, the employee filed for bankruptcy. The bankruptcy court refused to construe strictly the language of Section 525(b) to exclude the plaintiff from recovery solely because she was not a debtor at the time of her termination. *Id.* at 959. The court expressed two reasons for its refusal to enforce the plain language of the statute. First, the court expressed its belief that a strict interpretation of the statute would frustrate the intent of Congress by setting up a foot race between the prospective debtor and his or her employer. The court discerned this legislative intent by quoting from a Senate report accompanying S.445, the unenacted Omnibus Bankruptcy Act of 1983, which the court characterized as "a forerunner to the Bankr. Amend. of 1984." *Id.* Second, the *Tinker* court found it significant that Section 525(b)(2) prohibited discrimination against a debtor solely because such debtor has been insolvent before the

commencement of a case. The court, without explanation, concluded that the quoted language constituted "substantial proof that it is not just the filing of a petition for relief that triggers the protection of 11 U.S.C. § 525(b)." *Id.* The bankruptcy court nonetheless entered judgment in favor of the bank, and in doing so prevented its liberal reading of Section 525(b) from being challenged, reasoning that the prospective bankruptcy, although a factor, was not the sole factor in the bank's termination decision.

2. The Eleventh Circuit And The District Court Correctly Affirmed The Bankruptcy Court's Decision That The Tinker Dicta Should Not Be Followed.

In the instant case, the lower courts rejected the legal analysis set forth in *Tinker* — and for good reason. (App. A, B and C). *Tinker's* rejection of the plain meaning doctrine flies in the face of the settled decisions of higher courts, including the aforementioned decisions of this Court. It is also contrary to the plain language analysis employed by the First Circuit, the only Court of Appeals that has had occasion to directly construe Section 525(b), as well as those courts that have found Section 525(b) to be clear on its face. *Laracuente,* 891 F.2d 17 (holding that Section 525(b) should be narrowly construed in accordance with its plain meaning and rejecting policy arguments in favor of a liberal construction); *see* cases discussed above at 7.

Kanouse argues that the holding in *Tinker* is consistent with an exception to the plain meaning doctrine recognized by the Supreme Court in *Ron Pair.* (Pet. Br. at 14). As a review of the Court's decision in *Ron Pair* makes clear, Kanouse exercises considerable editorial license in characterizing that exception. What the Supreme Court actually stated in *Ron Pair* in dictum was that: "The plain meaning of legislation should be conclusive, except in the rare cases (in which) the literal application of a

statute will produce a result demonstrably at odds with the intention of its drafters . . ." 489 U.S. at 242, 109 S. Ct. at 1031. As this Court held in *Ron Pair*, a proponent of this exception must meet an "exceptionally heavy" burden to establish that Congress intended a result at odds with the plain meaning of the Bankruptcy Code. *Patterson v. Shumate*, 112 S. Ct. at 2248. Kanouse utterly fails to meet this burden.

The legislative history relied upon by Kanouse is the same sparse, indirect legislative history cited in *Tinker*. It consists of a single Senate Report to the *unenacted* Omnibus Bankruptcy Improvement Act of 1983, which was but one of several stillborn bills that preceded the July 10, 1984 enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 ("BAFJA") by both houses of Congress. When viewed in the light of day, this meager legislative history referenced in *Tinker* and relied upon by Kanouse is no legislative history at all.

The Eleventh Circuit in *Burns* refused to be swayed from a plain language interpretation of the Bankruptcy Code by far more compelling, direct legislative history, noting in a footnote that "even a conference report cannot overrule the clear direction of the statute itself." 887 F.2d at 1548 n. 7. The Bankruptcy Court's determination, quoted with approval by the District Court (App. B and C), was eminently correct that the indirect legislative history relied upon by Kanouse is far too inconclusive an expression of congressional intent to overcome the clear command of the statute itself. (App. B and C); *see In re Burns*, 887 F.2d at 1551-52. Kanouse's invitation to rewrite the statute violates not only the plain meaning of Section 525(b), but also undermines the intent and prerogative of Congress in enacting Section 525(b).

In *In Re Madison Madison Intern. of Illinois, P.C.*, 77 B.R. at 681, the Bankruptcy Court for the Eastern District of Wisconsin

declined a similar invitation to rewrite Section 525(b) and correctly stated:

> [a]ny attempt to liberalize this statute, in the face of its plain meaning is inappropriate. Had Congress intended an expansive interpretation to § 525(b), it could have so stated. Where Congress wants to permit an action, it is capable of making that intention clear . . . We cannot find a cause of action under § 525 when Congress has expressly declined to provide one. This is not a case where following the clear language of the statute will lead to an absurd result. Courts must not engage in judicial legislation. They are not empowered to tinker with Congress's statutory schemes, even if they believe they can improve upon them.

In re Madison Madison Intern. of Illinois, P.C., 77 B.R. at 681, (internal citations omitted).

In addition, nothing in the direct legislative history of BAFJA, which Act included Section 525(b), suggests, much less establishes, that a literal interpretation of Section 525(b) stands at odds with the intention of its drafters. BAFJA contains *no* relevant commentary relating to Section 525(b). On Page 15 of his brief, Kanouse acknowledges as much and admits that "there is no legislative history accompanying the 1984 amendment." (Pet. Br. at 15).

Finally, Kanouse, in line with *Tinker,* also argues that the language of Section 525(b)(2) suggests that "an insolvent individual who has not yet filed for bankruptcy protection when terminated may still fall within the protection of the statute once

he does file." (Pet. Br. at 11). This argument is premised on an obvious misreading of the statute. Section 525(b)(2) prohibits a private employer from terminating the employment of, or discriminating with respect to, employment "against an individual who is or has been a debtor . . . solely because such debtor . . . (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge . . ." 11 U.S.C. § 525(b)(2).

In spite of Section 525(b)(2)'s clear language, Kanouse requests the Court to disregard the identity of the class of persons entitled to statutory protection (*i.e.*, present and past debtors) and to expand the protections of the Bankruptcy Code to include insolvent employees, who eventually become debtors (*i.e.*, future debtors). Under this unworkable scenario suggested by Kanouse, employers are left to guess at their peril whether a given employee will file for bankruptcy at some time in the indefinite future. This twisted interpretation is not only unworkable, it runs contrary to the plain language of the statute. Section 525(b)(2) prohibits an employer from discriminating against a *debtor* on the basis that the *debtor* has been insolvent before the commencement of a bankruptcy case or during the case. It decidedly does not afford relief to a *non-debtor* on the basis that the *non-debtor* has been insolvent before the commencement of a bankruptcy case. Thus, Kanouse cannot satisfy the "exceptionally heavy" burden of demonstrating that the instant case is one in which a literal application of Section 525(b) would be demonstrably at odds with the intention of its drafters.

E. Kanouse's Interpretation Of § 525(b) Raises Serious Constitutional Questions In Violation Of The Canons Of Statutory Construction.

The reading of Section 525(b) urged by Kanouse not only conflicts with the plain meaning of the statute, but also conflicts

with the rule against construing a federal statute in a manner that raises serious constitutional problems. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 604 (11th Cir.), *cert. denied*, 113 S. Ct. 182, 121 L. Ed. 2d 127 (1992); *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S. Ct. 2495, 2501, 101 L. Ed. 2d 420 (1988). According to Kanouse, a lawful discharge can be rendered unlawful after the fact if the employee elects in the future to file for bankruptcy. If Section 525(b) is construed as Kanouse suggests so as to prohibit a private employer from discriminating against an "individual who is, has been or *will be* a debtor," then the statute is arguably violative of due process and void for vagueness. No statute, no matter the standard of review, that prohibits discrimination against an unknown class of persons whose identity depends upon the occurrence of an uncertain future event can meet constitutional muster. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S. Ct. 1186, 1193, 71 L. Ed. 2d 362 (1982) (setting forth standard for constitutional sufficiency of laws regulating economic activity). This would be similar to a federal statute prohibiting discrimination against any "individual who *will be* a homeowner." Such a law presents the same evil that led to the constitutional prohibition against *ex post facto* laws. Simply put, no action that is lawful at the time of its performance should be rendered unlawful after-the-fact. Yet, that is the interpretation of Section 525(b) urged by Kanouse.

F. The *Tinker* Case Is Factually Distinguishable From The Instant Case.

Each of the lower courts also found the *Tinker* decision to be factually distinguishable from the instant case. (App. A, B and C). Judge Mark noted that the rationale of the *Tinker* case is premised upon safeguarding against a race between an employer and a prospective debtor in which the employer seeks to fire the employee before the employee can file for protection under the

Bankruptcy Code. (R1-2, Exh. 14-6). Judge Mark determined that:

> The instant case does not present the "race" scenario troubling to the *Tinker* court. Here, Kanouse waited 209 days after his resignation before he filed his Chapter 11 petition. Thus, to the extent that strong equitable considerations affected the *Tinker* decision, those considerations do not exist in this case.

Id. Judge Aronovitz and the Eleventh Circuit agreed with Judge Mark's reasoning finding that no race scenario existed. (App. B and C).

In *Tinker,* the employee was abruptly fired by the employer. Here, in breach of the 30 day notice requirement of his employment agreement, Kanouse abruptly resigned from Gunster in order to practice with his own firm, Keith Kanouse, P.A., with newly opened offices in Boca Raton, Florida. Unlike the fired employee in *Tinker,* Kanouse was not suddenly discharged by Gunster. Kanouse suddenly resigned from Gunster.

Judge Mark was eminently correct in his determination that the instant case does not present a "race" scenario. As Judge Mark noted, "Kanouse waited 209 days after his resignation before he filed his Chapter 11 petition." (App. C). Kanouse's 209 day delay between the filing of his bankruptcy petition and his job resignation is more than 40 times greater than the 5 day interval in *Tinker.*

At no time was Kanouse at risk of being terminated by Gunster before he could succeed in filing a petition for relief. The

contrary was true. By his own admission, Kanouse first had to file for bankruptcy in order to trigger the Management Committee's alleged threat to call a Board of Directors meeting to seek his expulsion. (Pet. Br. at 6). Moreover, under the terms of his employment agreement, a majority vote of Gunster's entire Board of Directors, consisting of all of its partners, was required to terminate Kanouse's employment, which termination was not effective until 30 days from and after the vote. Thus, the element of a competitive foot race to the courthouse that the *Tinker* court found so persuasive is entirely lacking.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for writ of Certiorari should be denied.

Respectfully submitted,

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